

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

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|------------------------------------|---|-----------------------------|
| IN RE: |) | |
| INTEL CORP. MICROPROCESSOR |) | |
| ANTITRUST LITIGATION |) | MDL Docket No. 05-1717-JJF |
| |) | |
| PHIL PAUL, on behalf of himself |) | |
| and all others similarly situated, |) | |
| |) | |
| Plaintiffs, |) | |
| v. |) | Civil Action No. 05-485-JJF |
| |) | |
| INTEL CORPORATION, |) | CONSOLIDATED ACTION |
| |) | |
| Defendant. |) | |
| |) | |

**REPLY LETTER IN SUPPORT OF CLASS PLAINTIFFS'
REQUEST TO COMPEL FRY'S ELECTRONICS, INC. (DM No. 5)**

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Dated: April 23, 2007

Dear Judge Poppiti:

This is Class Plaintiffs' reply letter brief on their motion to compel Fry's Electronics, Inc. ("Fry's"). Fry's does not deny that in the seven months of negotiations before Class Plaintiffs moved to compel, it never once offered to produce any data and never even produced the tiny data sample that the parties requested on multiple occasions as the most efficient and effective means of permitting the parties to narrow their request to the most relevant data fields. Only after Class Plaintiffs moved to compel did Fry's, for the first time, offer to produce data. As will be explained, Fry's offer is wholly deficient. Indeed, the offer demonstrates that the relief requested in Class Plaintiffs' initial letter brief is no longer sufficient.

Class Plaintiffs begin by specifying the relief they now seek. Then, because the post-motion negotiations and Fry's opposition raise new issues, Class Plaintiffs define the issues that are ripe and necessary for this Court to decide. Finally, Class Plaintiffs explain why the arguments in Fry's opposition are not meritorious.

1. Broader Relief is Necessary to Address Fry's Continued Intransigence

Before filing their letter brief, Class Plaintiffs expected that if Fry's were compelled to produce data by a date certain, the details of the production could be timely negotiated without requiring further Court intervention. Based on their post-motion negotiations with Fry's, wherein the company's only proposal to produce data was completely inadequate, Class Plaintiffs are now convinced that Fry's is not prepared to make a sufficient production of data unless specific parameters are first established by the Court. Fry's offers to produce "summary reports showing *aggregate* information from a *sample* of computer models *provided that* [its modifications to the protective order are entered]." See Declaration of Richard M. Volin ("Volin Decl."), filed herewith, Ex. C, at 2 (emphasis added). Protective order modifications aside, the limits on Fry's proposed production alone make the offer a non-starter. As explained by Class Plaintiffs' consultant tasked with data work in this case, "Fry's proposed sample includes merely one data point per computer product and appears not even to include all the relevant products purchased and sold by Fry's. The lack of a time dimension, in particular, renders the proposed data sample irrelevant to Class Plaintiffs for a variety of reasons (e.g., if costs and sales prices of computer products change over time)." Declaration of Jonathan M. Orszag ("Orszag Decl."), filed herewith, ¶ 8.

Accordingly, the Court should enter an Order establishing the following parameters, procedures and timetable to ensure Fry's timely and proper production of data:

1. Fry's will produce a data sample within one week. The sample will contain transactional data as maintained in the ordinary course of Fry's business for a two-day period for two PLUs [the term Fry's uses instead of SKUs] for the fields, or Fry's equivalent, listed in Attachment A to the parties' February 23, 2007 letter. See Volin Cert., Ex. H.¹

¹ See Orszag Decl. ¶ 9 ("Using either data dictionaries or a limited sample production, Class Plaintiffs would then be able to specify adequately the full set of relevant fields associated with Fry's transaction level sales and purchase data production. Through this process, Fry's could then provide the Class Plaintiffs with the most relevant data at the most modest burden.").

2. Within two weeks, the parties will identify the fields from the data sample for which they seek full production. Fry's will cooperate with the parties to answer their questions about the data sample, including by making its IT personnel available for conference calls.
3. Fry's will produce all transactional data available within the fields designated by the parties for the period 2000-2006 in a format acceptable to the parties.
4. The parties and Fry's will attempt to negotiate an agreement to share Fry's reasonable out-of-pocket production expenses.
5. Any disputes regarding compliance with this protocol will be brought to the Special Master's prompt attention for resolution pursuant to expedited proceedings.

2. Several Issues Are Ripe and Necessary for Decision

Class Plaintiffs' initial brief addressed five basic issues: (1) whether Fry's transactional data are relevant; (2) whether the possibility that Fry's data might partially and imperfectly overlap with another party or third-party's production eliminates its obligation to produce; (3) whether the existing protective order applies to Fry's data; (4) whether this Court has jurisdiction to enforce the subpoena served on Fry's; and (5) whether production of the requested data would impose an excessive burden on Fry's.

Little further need be said as to these issues. Fry's makes no effort to dispute Class Plaintiffs' explanation of the relevance of its data, and the Orszag Declaration leaves no doubt that Fry's data are relevant and important. *See* Orszag Decl. ¶¶ 4-7. Class Plaintiffs' initial brief explains that the possibility of partially and imperfectly overlapping data does not relieve Fry's of its obligation to produce, and Fry's makes no real attempt to argue otherwise.² Fry's abandons its argument that the protective order does not apply to its data. Fry's does dispute that this Court has jurisdiction, but cites just one case from the Northern District of California. The weight of authority and the better reasoned cases, however, hold otherwise. *See* Initial Brief at 4.³ Fry's continues to assert undue burden, but its argument reflects a misunderstanding of its production obligation. The parties seek production of Fry's transactional data *as they exist in the ordinary course of business*. Class Plaintiffs are not asking Fry's to perform any tasks other than downloading the relevant data onto a medium in an appropriate format. That task is not unduly burdensome and Fry's has not attempted to show otherwise.

In its opposition, Fry's raises four new issues, each of which is ripe for decision: (1) whether Class Plaintiffs have adequately identified the data they seek; (2) whether it is too soon to compel Fry's to produce data; (3) whether Fry's may produce just a sample of its data; and (4) whether Fry's may seek to modify the existing protective order. Class Plaintiffs address these arguments in turn.

² Instead, Fry's misrepresents Class Plaintiffs' position, claiming that "Plaintiffs concede that *much* of the information they seek is duplicative of information sought from the parties and third parties." Opp. Brief at 4 (emphasis added). In fact, Class Plaintiffs show how *little* overlap could occur. *See* Initial Brief at 3.

³ The court in *United States v. Diabetes Treatment Centers of America, Inc.*, 238 F. Supp. 270, 275 (D.D.C. 2002) considered and rejected the reasoning of the court in *Visx, Inc. v. Nidek Co.*, 208 F.R.D. 615 (N.D. Cal. 2002), the case on which Fry's relies.

3. Class Plaintiffs Have Clearly Described the Data They Seek from Fry's

After months of conferring about its data production, Fry's makes the remarkable claim that it does not know what data Class Plaintiffs seek. The answer is readily available in the subpoena served on Fry's in June 2006, in multiple subsequent emails and letters, and in Class Plaintiffs' initial brief. *See* Volin Decl. ¶¶ 1-2, 15-17.⁴

4. Fry's Should Be Compelled to Produce Its Data Now

Fry's asserts that the parties have not met and conferred enough. To be sure, the details of the production still need to be worked out, but the key point is that Fry's past and present positions make it highly unlikely that further negotiations will be productive unless the Court first decides the issues presented on this motion and establishes the procedures and parameters set forth above.⁵

Fry's also argues that Class Plaintiffs have no need for Fry's data unless and until the Court certifies a class. This argument overlooks that Intel and AMD, which do not face class certification, have subpoenaed essentially the same data. In addition, while Fry's blithely concludes that Class Plaintiffs do not need Fry's data for class certification, Class Plaintiffs submit that they should be able to exercise their best judgment about how to respond to the arguments that Intel is likely to make in opposition to class certification.

5. Fry's Should Make a Full Production of its Data

Fry's argues that if it must produce its data, it should produce only a "statistically relevant sample." Opp. Brief at 4.⁶ Class Plaintiffs are amenable to receiving such a sample for class certification purposes, but Fry's would then need to produce the full dataset for merits. *See* Volin Decl. ¶ 14. Class Plaintiffs are entitled to a full production of data for merits because such a production would not be unduly burdensome (*see* Orszag Decl. ¶¶ 10-11), and the protective order provides sufficient protection, as discussed next.

6. No Further Modifications of the Protective Order Should Be Permitted

Fry's is not entitled to re-open months of negotiations among the parties and various third parties, as well as full proceedings before this Court in which all subpoenaed third parties, including Fry's, were given a full opportunity to object to the parties' proposed protective order and argue before the Special Master. The centerpiece of Fry's current protective order

⁴ Nevertheless, Fry's appears to misunderstand the type of information Class Plaintiffs seek, and possibly does not point to the correct system where the relevant data are stored. *See* Orszag Decl. ¶¶ 10-11.

⁵ Fry's has stated that it will not produce data unless the protective order is modified. Moreover, given seven months of unproductive negotiations and the fast-approaching deadline for the opening class certification brief, Class Plaintiffs cannot afford to negotiate for weeks more and then move to compel on, at least, the protective order issue. Further, the complete inadequacy of Fry's data production proposal offers little hope that a compromise can be reached without some assistance from the Court. *See* Volin Decl. ¶¶ 9-13.

⁶ Fry's acknowledgement that a sample should be "statistically relevant" cannot be squared with its offer to produce just one data point per product.

modification – additional protections for a second tier of highly confidential documents – was specifically presented in Fry’s objections filed with the Court in May 2006, but was not accepted by the Special Master or the Court. See Volin Decl. ¶ 18. Nothing has changed since May 2006. The data the parties seek from Fry’s now is similar to the data subpoenaed by AMD back in 2005. *See id.*

The possibility that transactional data would fall into the hands of competitors and suppliers – the concern articulated here by Fry’s – was considered by the Special Master in recommending, and the Court in entering, the existing protective order.⁷ Clearly, the Court expected that documents and data of the very type that are the subject of this motion would be produced in this litigation, and understood that improper disclosure of such documents *would* cause competitive harm. Nonetheless, the Court concluded that the protections afforded by the existing protective order were sufficient. In short, in entering the protective order, Fry’s concerns – as presented to the Court in May 2006 and as presented again now – were considered and ruled upon.⁸ Thus, Fry’s has provided no reason to change the existing order.

7. Conclusion

Class Plaintiffs have demonstrated their need for Fry’s data, and Fry’s has not attempted to show otherwise. Fry’s arguments that Class Plaintiffs can wait until after class certification and need only a sample should be rejected for the reasons expressed above. Fry’s attempt to show that the burden and harm of production are too great likewise must fail. Accordingly, Class Plaintiffs respectfully submit that their motion should be granted.

Respectfully submitted,

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 Enclosures

⁷ The protective order enumerates both (1) the particular types of documents that may be designated confidential, and (2) the specific protections that such confidential documents will receive. Among the documents that the order defines as “Confidential Discovery Material” are: “Non-public pricing information,” “Non-public data concerning sales, revenues, profits, margin and variances,” “Non-public customer lists,” “Non-public data concerning costs . . . ,” and “Other information or documents the disclosure of which the Producing Party can demonstrate would cause a clearly defined and serious injury.” Protective Order, Definition M(1),(3),(6),(9),(16). Moreover, the order observes in a “whereas” clause that “the preparation for trial of these actions may require the discovery and use of documents and other information which constitute or contain commercial or technical *trade secrets*, or other confidential information the disclosure of which *would be competitively harmful* to the producing party.” *Id.* at 2 (emphasis added).

⁸ In addition to inappropriately asking to re-open the protective order proceedings, Fry’s proposed modification of the existing protective order is unreasonable and unworkable. See Volin Decl. ¶¶ 20-23. Moreover, seventeen other third parties (ten making full productions and seven producing samples) have been willing to produce, and have produced, transactional data under the existing protective order. *Id.* ¶ 24.

cc: Clerk of the Court (By electronic filing)
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CERTIFICATE OF SERVICE

I, J. Clayton Athey, hereby certify that on this 23rd day of April, 2007, I caused the foregoing **REPLY LETTER IN SUPPORT OF CLASS PLAINTIFFS' REQUEST TO COMPEL FRY'S ELECTRONICS, INC. (DM No.5)** to be served on the following counsel via electronic filing:

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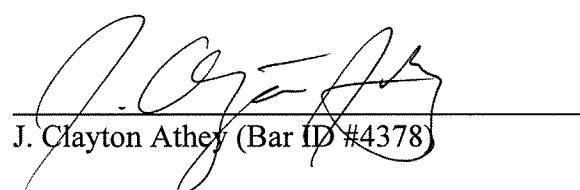
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